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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. .....

In the Matter of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

Manufacturers Hanover Trust Company, as Trustee of the First and Refunding Mortgage of the Debtor,

Petitioner.

United States of America, Interstate Commerce Commission and Penn Central Company, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BEFORE JUDGMENT

Petitioner, Manufacturers Hanover Trust Company, as Trustee of the First and Refunding Mortgage of The New York, New Haven and Hartford Railroad Company, respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Second Circuit to review so much of the above case which is now pending in that Court as relates to "Step I" issues (i.e. issues relating to the sale of the New Haven assets to Penn Central Company, as distinguished from issues relating to that portion, "Step II" of the Plan of Reorganization, which involves the internal reorganization of the New Haven

including the rights of creditors *inter se*), which are dealt with in Part I of the Order of the District Court for the District of Connecticut (the "Reorganization Court") dated July 28, 1969 (pp. 316-18a).*

Opinions Below

The opinion of the Reorganization Court dated May 28, 1969 has not yet been reported. It is reprinted in the Appendix entitled "The New Haven Railroad Terms of Sale and Inclusion Cases" which is being filed herewith, at pp. 277-306a. The Fourth Supplemental Report of the Interstate Commerce Commission (the "Commission"), dated November 25, 1968 (pp. 112-220a), to which the Opinion of the Reorganization Court relates, is reported at 334 I.C.C. 25**.

The opinion of the Three Judge Court for the Southern District of New York (the "Three Judge Court") dated June 18, 1969 (pp. 400-43a) dealing with the same question (viz., the price to be paid by Penn Central for the New Haven assets) as the Reorganization Court's opinion and relating to the Fourth and Fifth Supplemental Reports of the Commission, has not yet been reported.

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* The opinions below are separately bound in an Appendix entitled "The New Haven Railroad Terms of Sale and Inclusion Cases" which is being filed herewith. References to that Appendix are identified by the letter "a" following the page reference.

References preceded by "NH" or "R" are to exhibits at the hearings before the Commission's Examiners and references preceded by "Tr." are to pages in the hearing transcript.

** The Fifth Supplemental Report of the Commission on Reconsideration, dated July 10, 1969 was made public after the Reorganization Court's Opinion was filed (May 28, 1969) but before its Order thereon was entered (July 28, 1969). This Report was modified by the Commission on August 26, 1969 and, as so modified, is reported at 334 I.C.C. 528 and at pp. 222-28a. It appears to have been issued solely in response to the decision of the Three Judge District Court for the Southern District of New York dated June 18, 1969 (pp. 400-43a) and is not referred to in the Order dated July 28, 1969 (pp. 316-22a) of the Reorganization Court.

The opinion of the Reorganization Court dated August 10, 1968 (pp. 237-60a), which relates to the Second Supplemental Report of the Commission is reported at 289 F. Supp. 451. The Second Supplemental Report (pp. 1-111a) is reported at 331 I.C.C. 643. The Opinion of the Three Judge Court dated July 10, 1968 (pp. 323-83a), which also relates to the Second Supplemental Report, is reported at 289 F. Supp. 418.

The opinion of the Reorganization Court dated and filed December 24, 1968 entitled "Memorandum of Decision on Inclusion and Payment by January 1, 1969" (pp. 263-68a) has not yet been reported.

Jurisdiction

The order of the Reorganization Court dated July 28, 1969 (pp. 316-22a) was entered on the same date and a Notice of Appeal to the Court of Appeals for the Second Circuit was filed by Petitioner on August 26, 1969.

The Record on Appeal was docketed in the Court of Appeals on December 1, 1969, within the time for docketing as extended by that Court in respect of the Orders from which the appeals were taken. No briefs have been filed in the Court of Appeals and the case has not been heard or decided by that Court.

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(e) and Rule 20 of the Rules of this Court.

At or about the time of the filing of this Petition, Petitioner and others are filing with this Court pursuant to Rule 15, a Jurisdictional Statement in support of its appeal filed October 9, 1969, from the decree of the Three Judge Court (pp. 446-52a) dated and entered September 11, 1969. That decree decides substantially the same issues (i.e., those concerning valuation) as those decided by Part I of the

Order of the Reorganization Court dated July 28, 1969 (pp. 316-22a) which are sought to be reviewed by this Petition.*

Questions Presented

1. Whether an insolvent railroad which has been required to continue in operation for over seven years at substantial loss and consequent erosion of the security of its bondholders, may be required under the Constitution and Section 77 of the Bankruptcy Act to accept consideration worth substantially less than the fair liquidation value of the assets being sold, including specifically the following question:

(a) whether it is constitutionally permissible or in accordance with the requirements of Section 77 of the Bankruptcy Act for the Commission to treat as valueless, in determining the liquidation value of the railroad, important assets and elements of value including the following:

(1) the right of the railroad to fully-paid access to Grand Central Terminal and its correlated right to the income formerly used to defray Terminal expenses;

(2) the going concern value of the railroad as a utility in being which is to be continued in operation where this is an element of value under the condemnation law of a state or states where a part of the railroad's assets are located;

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* The factual statement and argument in this Petition essentially repeat certain portions of the Jurisdictional Statement, namely, the factual statement and the discussion of (i) the value of the New Haven's right to fully paid access to Grand Central Terminal; (ii) going concern value; (iii) the value of the Penn Central stock; and (iv) interim loss sharing. For the convenience of the Court we have repeated these matters in full in this Petition to avoid cross referencing and to present the points in support of this Petition in a single document. The Jurisdictional Statement contains additional issues which are not covered in this Petition.

(b) whether it is constitutionally permissible or in accordance with Section 77 of the Bankruptcy Act for the Commission to achieve a purported equality between what it has found to be the adjusted liquidation value of the assets conveyed by the New Haven and the value of the consideration to be received by the New Haven by assigning grossly inflated values to the consideration furnished by Penn Central, including shares of its common stock, and whether the modifications made by the Reorganization Court are adequate to cure this deficiency.

2. Whether, in view of the terms and conditions of the orders of this Court and of the Commission approving the merger of Penn and Central, the Commission, under the Constitution and Section 77 of the Bankruptcy Act, may properly require the bondholders of the New Haven to absorb the New Haven's operating losses during the eleven month period between the Penn Central merger and inclusion of the New Haven in the merged railroad.

Constitutional Provisions and Statutes Involved

The following provisions of the United States Constitution and of the United States Statutes, which are believed to be involved in the determination of this case, are set forth in the Appendix entitled "The New Haven Railroad Terms of Sale Cases" which is being filed herewith, beginning at p. 453a:

(1) The Fifth Amendment to the United States Constitution;

(2) Sections 1(18), 1(20) and 5(2) of the Interstate Commerce Act, 49 U.S.C. §§ 1(18), 1(20) and 5(2); and

(3) Sections 77(b) and 77(e) of the Bankruptcy Act, 11 U.S.C. §§ 205(b) and 205(e).

Statement

On February 1, 1968, The Pennsylvania Railroad Company ("Penn") and The New York Central Railroad Company ("Central") were permitted to merge on terms and conditions which had been established by the Interstate Commerce Commission (327 I.C.C. 475, 328 I.C.C. 304) and approved by this Court (389 U.S. 486) over the objections of the New Haven bondholders. Among the conditions of the Penn Central merger was the following:

> "8. The Pennsylvania New York Central Transportation Company shall be required to include in the transaction all the New York, New Haven and Hartford Railroad Company—the inclusion of passenger operations being subject to the findings and determinations of the Commission as set forth in Finance Docket No. 23831 issued simultaneously with this report—upon such fair and equitable terms as the parties may agree subject to the approval of the Bankruptcy Court and the Commission. Within 6 months after the date this report is served, the parties shall file with the Commission for its approval, a plan for such inclusion. In the event the parties are unable to reach an agreement (and subject to approval by the Bankruptcy Court) such inclusion shall be upon such fair and equitable terms and conditions as the Commission may impose.
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> • • • • •
>
> Jurisdiction is hereby reserved for such purposes. Consummation of the merger by applicants shall indicate their full and complete assent to these requirements."* (327 I.C.C. at 553)

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* By report and order dated April 6, 1966, and published simultaneously with its initial report approving the merger, the Commission denied the New Haven Trustees' application for permission to discontinue long-haul passenger trains (327 I.C.C. 151) which had been filed in March, 1965.

Reorganization Court approval was required because the New Haven had been in reorganization, under Section 77 of the Bankruptcy Act, since July, 1961. In fact, it had had no net income since 1956 and incurred continuing substantial deficits in both net railway operating income and net income before and during reorganization* (cf. pp. 283-86a).

Before this Court approved the Penn Central merger, the Commission had issued its Second Supplemental Report (331 I.C.C. 643, p. 1a), in which it appeared to find, using an assumed valuation date of December 31, 1966, that the net liquidation value of the operating assets of the New Haven was $128.9 million, which it "rounded off" to $125 million, and that the fair value of the consideration to be paid by Penn Central, as specified in an agreement (the "Purchase Agreement" among Penn Central and the New Haven's Reorganization Trustees**) was $123.6 million, which it likewise "rounded off" to $125 million.*** In

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* The New Haven Trustees had concluded during their first six months of Trusteeship that the New Haven would have to be liquidated unless it could be merged with a trunk line carrier. In 1962, they intervened in the Penn Central merger case in order to seek to be included in that merger and negotiations on the terms of the inclusion commenced among Penn, Central and the New Haven Trustees, in June, 1964.

An application made in April, 1967 by the Bondholders' Committee to terminate the reorganization for the purpose of commencing liquidation was denied by the Reorganization Court in a decision dated February 13, 1968 (281 F. Supp. 65).

** The Purchase Agreement had not been submitted to the Reorganization Court for its approval and had been negotiated and executed without any notice to or participation by the New Haven's bondholders or their representatives.

*** The consideration took the form substantially of (a) 950,000 shares of Penn Central common stock, (b) $23,000,000 principal amount of Penn Central 5% bonds, (c) $8,000,000 cash, (d) assumption by Penn Central of certain obligations of the New Haven, principally under a mortgage of the Boston & Providence, and (e) $9.5 million in so-called "Purchase price adjustments," which reduced the New Haven's obligation to Penn Central under the Purchase Agreement.

view of this purported equality between the liquidation value of the New Haven assets and the value of the consideration to be paid, the Commission approved the terms of the Agreement, with one modification,* as the so-called "Step I" of the Plan of Reorganization of the New Haven and as satisfying the obligation of Penn Central upon their merger under Section 5(2) of the Interstate Commerce Act and under Condition 8, quoted above, of its order approving the Penn Central merger.

In the spring of 1968, parallel proceedings to review the Commission's Second Supplemental Report were commenced—(i) proceedings under Section 77 of the Bankruptcy Act before the Reorganization Court on the Commission's certification of the modified Purchase Agreement as "Step I" of the Plan of Reorganization of the New Haven; and (ii) a consolidated proceeding brought by Petitioner and other bondholder interests before the Three Judge Court to review the Commission's order insofar as it related to the Interstate Commerce Act.

The Reorganization Court filed an opinion and order on August 13, 1968 (289 F. Supp. 451, pp. 237-60a), in which it disapproved the Plan on the ground that the consideration which Penn Central was required to pay was inadequate and stated that the additional consideration to be paid by Penn Central "might properly fall within a range of $33,000,000 to $55,000,000." (289 F. Supp. at 465, p. 256a). The Three Judge Court, in an opinion and order filed May 6, 1968 (289 F. Supp. 418, pp. 323-83a), also disapproved

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* Responding to an application by the bondholders that Penn Central should be required to take over New Haven operations by lease or otherwise immediately upon the merger, the Commission added to the Agreement a provision requiring Penn Central to assume a portion of the operating losses of the New Haven for the period between the Penn Central merger and inclusion of the New Haven, computed on a sliding scale formula.

the Commission's order on the ground that the price Penn Central was required to pay appeared too low by $45-50 million (289 F. Supp. at 440, p. 358a).* Both courts remanded the case to the Commission.**

After an abbreviated hearing, the Commission issued its Fourth Supplemental Report and Order, dated November 25, 1968 (334 I.C.C. 25, pp. 112-221a). The Commission found that the New Haven assets to be sold to Penn Central had a net liquidation value of $162.7 million, $33.8 million more than it had found in its Second Supplemental Report, but then introduced as "Other Pricing Considerations" (334 I.C.C. at 53-63, pp. 140-50a), two entirely new concepts, an abandonment delay discount and a bulk sales discount which "adjusted" the net liquidation value of the New Haven assets downward by $22.1 million, from $162.7 million, to $140.6 million.***

Of the $22.1 million reduction, $15.4 million was deducted because of the assumed effect of a one-year delay in liquidation beyond the valuation date (December 31, 1966) which the Commission had selected on the theory that it would

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* The Three Judge Court also disapproved the Commission's "loss-sharing" formula because of its "in terrorem" aspects. (289 F. Supp. at 444, pp. 366-67a). The Reorganization Court seemingly agreed (289 F. Supp. at 464-65, p. 255a).

** Petitioner, and other parties, noticed appeals to the United States Court of Appeals for the Second Circuit from the decision of the Reorganization Court in order to preserve objections to certain points in that decision. These appeals are among those which are now consolidated in this proceeding.

*** Ironically, Commission counsel had admitted in the Three Judge Court hearing that in its original decision the Commission had made a double deduction of approximately $14.6 million (289 F. Supp. at 450, pp. 380-81a). By simply correcting this error and adding it to the net liquidation value found in the Commission's Second Supplemental Report, one would get a larger liquidation value—$143.5 million—than the Commission arrived at in its second effort, without any concern for new "pricing considerations" and wholly disregarding the other valuation errors noted by the courts.

take that long to obtain approval to abandon the railroad. An additional $6.7 million was deducted on the assumption that liquidation would necessarily occur on a bulk rather than a piecemeal basis, and the theory that an entrepreneur who purchased the land in bulk for resale would be entitled to additional compensation beyond that taken into account by the appraisal witnesses.*

Although the Commission received evidence on the value of Penn Central stock, which represented $83.1 million of the assumed value of the consideration to be paid by Penn Central, it adhered to its original determination that the "intrinsic" value of the stock is $87.50 per share, even though the stock had a market value of $52⅜ per share on December 31, 1966, the valuation date used by the Commission for the New Haven assets, and a market value of between $60 and $65 per share during November, 1968, the period when the Commission was deliberating. (The stock closed at 63⅜ on the actual closing date, December 31, 1968; since then, it has fallen steadily lower.)**

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* The witness who proffered this theory had never seen any of the appraisals or read any of the appraisers' testimony (Tr. 29823-34, 29855, 29858-60, 29878). The basic valuation studies were put into evidence through the following witnesses: for the New Haven Trustees, by William Gordon, of Coverdale & Colpitts, Consulting Engineers; Frank A. Mason, Vice President of Meredith & Grew, Inc., appraisers; and Bradford Thompson, who headed the New Haven real estate department; for Penn Central, by Francis Gasparini, Central's General Real Estate Manager; Norman Hull, Central's Assistant Comptroller; and John R. White, Executive Vice President of James D. Landauer Associates, Inc., real estate consultants; and for the bondholders, by Paul O'Keefe, a real estate appraiser.

** As directed by the courts, the Commission eliminated the "in terrorem" provisions of its original loss-sharing formula, and simply required Penn Central to pay a lump sum of $5 million as its share of the New Haven's operating losses for the last eleven months of 1968, the period between the Penn Central merger and the New Haven's inclusion (334 I.C.C. at 74, p. 161a). This amount has been variously estimated at between 40% and 60% of the New Haven's actual loss for that period. Cf. 334 I.C.C. at 73-74, pp. 160-61a, and discussion at pp. 23-25 *infra*.

Parallel proceedings were again commenced—in the Three Judge Court and in the Reorganization Court—to review the Commission's Fourth Supplemental Report. On this review, the result was a significant difference between the decision of the Reorganization Court and the majority opinion of the Three Judge Court, which has created the problem that this Court is now urged to resolve.

In its opinion dated May 28, 1969, the Reorganization Court held that the "administrative delay" discount of $15,386,000 and the "bulk sale" discount of $6,695,000 should not be deducted from the amount of $162.7 million which the Commission had found to be the net liquidation value of the New Haven assets (pp. 281-93a). Both discounts, the Reorganization Court held, "illegally contravened the statute [Section 77]" (p. 281a). The Reorganization Court characterized the Commission's administrative delay discount as an "arbitrary device" which the Commission "hauled in by the heels" to reduce the liquidation value of $162.7 million which it found "because it felt that the figure was too high to be fair and equitable to Penn Central" (p. 292a).

The Three Judge Court (Weinfeld, J. dissenting) upheld the Commission in deducting the two discounts described above. The two courts also reached conflicting results on several other substantial points, including the following:

Items which Reduce Liquidation Value	Reorganization Court	A Majority of the Three Judge Court*
"Administrative Delay" Discount—$15,386,000	Rejected (pp. 279-92a)	Approved (pp. 411-16a)
"Bulk Sale" Discount —$6,695,000	Rejected (pp. 292-94a)	Approved (pp. 416-18a)
Items which Increase Liquidation Value		
Adjustments in the discount to present worth of net liquidation receipts	Approved an increase of $2,415,889 (p. 318a)	Tentatively approved an increase of $410,000, pending review by this Court (pp. 444-45a)
Adjustments in the valuation of the Harlem River and Oak Point Yards—$4,439,000	Approved (pp. 295-97a)	Rejected (p. 423a)

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* Judge Weinfeld agreed with the Reorganization Court, and disagreed with the majority of the Three Judge Court with respect to the "administrative delay" (pp. 435-38a) and "bulk sale" discounts (pp. 438-39a) and the valuation of the Oak Point and Harlem River Yards (pp. 442-43a); he apparently expressed no view on the question of the discount of net receipts to present value. He also disagreed with all the other judges as to the treatment of "loss-sharing" (Judge Weinfeld was of the view that Penn Central should bear all interim losses) (pp. 441-42a) and did not agree that the "underwriting" formula was a satisfactory solution to the Commission's overvaluation of the Penn Central stock (p. 442a).

As a result of these disagreements, the two courts differ in their views as to the amount to which the New Haven is entitled by approximately $28 million.

Both courts rejected the bondholders' contentions that the valuation of the New Haven assets should be increased to take into account a number of items, including: (a) New Haven's right of fully-paid access to Grand Central Terminal and its correlated right to the income formerly used to defray its share of the expense of Terminal operations; (b) the "going concern" value of the New Haven; (c) the value of certain New Haven assets, notably its investments in other companies; (d) the reduction of net liquidation value by $3 million for purported 1966 "depreciation".

Both courts also agreed that the Commission erred in valuing Penn Central stock at $87.50 per share. The Reorganization Court developed *sua sponte*, and the Three Judge Court later adopted in substance, an "underwriting" formula under which, in essence, Penn Central must pay the difference between the market value of the stock nine years hence and $87.50, unless the stock previously reaches that figure (pp. 299-301a, 318-19a, 429-30a, 449-52a).*

* As noted previously, Judge Weinfeld dissented on this point (pp. 441-42a).

Reasons for Granting the Writ

1. This Court should grant certiorari to review immediately the decision of the Reorganization Court in order to permit a prompt, expeditious and comprehensive review of a matter of imperative public importance and to minimize the consequences of the "duplicitous system of review" * in which this case has become involved, which has resulted in a substantial conflict between the decisions of the two lower courts.

Before turning to the substantive questions which are involved in this appeal, it seems to Petitioner essential to discuss the reasons which prompt it to request this Court to exercise its power to grant certiorari before the decision of the Second Circuit. Briefly, we seek by this means to consolidate the two branches of this case in the one forum which can authoritatively and effectively dispose of all the pending issues and thereby make possible a speedy conclusion of the long-delayed reorganization of the New Haven.

Both of the reviewing courts have made clear their dissatisfaction with the duplication of jurisdiction which they have encountered and their belief that the resolution of the conflict in their decisions lies in this Court (pp. 315a, 431a, 445a).

This case involves important constitutional and statutory questions of valuation which will directly affect a large numbers of investors,** and may indirectly affect many other railroad investors in the future. In addition, it may bear upon the continued existence of those trains

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* 289 F. Supp. at 425, pp. 325-26a, 430a.

** This Court has noted, in *Continental Bank v. Rock Island Railway*, 294 U.S. 648, 685 (1935), that in Section 77 cases, swift disposition is a paramount consideration.

that the New Haven previously operated,* a matter of critical public concern. For these reasons, we submit, this case is of such imperative public importance as to support immediate determination by this Court as the only forum which can speedily and efficaciously resolve the substantial conflict between the decisions of the two lower courts.

Moreover, if this Court decides to hear the appeal from the Three Judge Court, it will then have before it all of the questions involved in this petition for certiorari. In similar circumstances, this Court has granted a petition for certiorari prior to judgment below. See *Hannah* v. *Slawson*, 361 U.S. 910 (1959); *United States* v. *Thomas*, 361 U.S. 950 (1959); *Reid* v. *Covert*, 354 U.S. 1, 5 (1956); *White* v. *Mechanics' Securities Corp.*, 269 U.S. 283, 299 (1925).

2. The decision of the Reorganization Court is in error in several substantial respects which bear importantly on the application of Section 77 of the Bankruptcy Act and unlawfully deprive the New Haven of its property.

A. *The Reorganization Court's decision, while it recognizes that the New Haven's right to fully-paid access to and use of Grand Central Terminal may be a valuable asset, in fact accords this asset no value in determining the liquidation value of the New Haven.*

The reviewing courts and the Commission have all agreed in holding that the New Haven, as Penn Central's partner in the development of the Grand Central Terminal

* Penn Central and certain bondholder interests have contended, and, as far as we know, may still contend that unless a price can be found for the New Haven which is "fair and equitable" to each, the New Haven assets should revert to the estate in order that it can then be liquidated. While we regard this question as one which can be resolved by this Court, we note that it derives new vigor from the impasse which the conflict of decisions has now produced.

Properties, is entitled to 50% of the "excess income" from all of those properties, i.e., income in excess of that used to defray Terminal expenses (pp. 117-18a, 253a, 295a, 418a, 419a). But neither the Commission nor the Courts have given any recognition, in terms of valuation, to the New Haven's admitted right to have approximately $5.6 million per year of Terminal Income (in addition to the so-called "excess income") used to defray the New Haven's portion of the expenses of the Terminal.*

As a result, since January 1, 1969, Penn Central's New Haven Division trains (i.e., the former New Haven trains) have used the Terminal at the expense of the New Haven because the allocated cost of those trains, $5.6 million, was deducted before computing the amount of "excess income" to be capitalized in determining the sales price. Penn Central retains all revenues from the trains.**

In its opinion dated August 13, 1968, the Reorganization Court concluded that the New Haven's right to fully-paid access to and use of the Terminal represented "a valuable interest" which Penn Central had acquired (289 F. Supp. at 463, p. 253a) and directed the Commission to "make findings" as to what value, if any, attached to that right.

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* The annual expenses of the Terminal amounted to about $13.6 million in 1964-66. These expenses include primarily the handling of trains, freight and passengers in the Terminal and the cost of owning and operating Grand Central Terminal itself. The New Haven's share of these expenses—and of the income used to defray those expenses—based on its historic car-use ratio of about 41%, is $5.6 million per year.

** Since January 1, 1969, Penn Central has, of course, also received 100% of the "excess income" as well.

In its Fourth Supplemental Report, the Commission stated, "In liquidation the right to free use of the terminal would have no value to NH unless there was a buyer willing to pay for the use" (334 I.C.C. at 32, p. 119a). The Commission then concluded that the only potential buyer was the State of New York and that the right was valueless in those circumstances because the bargaining power of the State was so great that it would not "need to bid for free use of the terminal" (334 I.C.C. at 32, p. 119a).*

The Commission's conclusion was apparently accepted by the Reorganization Court in its decision of May 28, 1969. Subsequently, however, in its memorandum of July 28, 1969, the Reorganization Court indicated that its conclusion was not free from doubt and noted that if the right of fully-paid access were recognized it would have a potential value of $70 million (p. 314a).

It seems plain that both the Commission and the Reorganization Court agree that the right of fully-paid access to the Terminal is a valuable right if a buyer can be found. And it is clear that there are at least two buyers for the New Haven's right—New York State and Penn Central itself, which is committed and compelled to acquire the property by reason of its own Agreement and Condition 8 of the Commission's order approving the Penn Central merger (p. 6 *supra*), which Penn Central accepted by merging. For both the State and Penn Central, the New Haven's right to operate into the Terminal and to have Terminal income used to defray its expenses, has value.

By acquiring the New Haven's interest, Penn Central has acquired full and clear title to property which is worth

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* Apparently, Penn Central has in fact reached agreement with New York and Connecticut. See the first footnote on p. 18 *infra*.

at least $227 million (NHI-1, App., p. 3); and the undivided use of at least $18.4 million per year of income (334 I.C.C. at 39, p. 126a).

As the owner of this property, Penn Central is now (and was known at the time of the hearings to be) negotiating with Connecticut and New York to arrange for a New York State-Connecticut authority to take over the New Haven division commuter operations into Grand Central Terminal with Federal aid.* Whatever form that arrangement may finally take, Penn Central will have obtained some consideration for the use of the Terminal, which it now owns free and clear of the New Haven's rights. *Prima facie,* as the Commission recognized (334 I.C.C. at 32, p. 119a), the result of such an arrangement would be that the commuter authority would pay the "net cost of operating" the New Haven division trains into and out of the Terminal. Based on the record, that cost at present must be taken as substantially equal to $5.6 million per year.** Penn Central has acquired from the New Haven the New Haven's right to have $5.6 million of income, arising from the partnership enterprise, expended for its benefit to defray expenses which the New Haven otherwise would have had to meet by other means. The value

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* In fact, since the record in this case was closed, it has been announced in the press that a joint instrumentality of New York and Connecticut has agreed to acquire the New Haven commuter service from Penn Central. We understand that as part of this agreement, the Commuter Authority will lease from Penn Central the track between Woodlawn, N.Y. and the Terminal and partial use of the Terminal itself under terms whereby it will pay $2.9 million per year. New York Times, November 26, 1969, pp. 1, 32.

** Depending upon the nature of the transaction, it may be necessary to reduce this figure by the allocated cost of New Haven division long-haul passenger service, if Penn Central continues to be responsible for that service.

of that right, we submit, is the capitalized value of an annual income of $5.6 million, or about $70 million, using the Commission's capitalization rate for Grand Central Terminal "excess income" of 8%.

This conclusion, we submit, is not changed if, as a result of bargaining, the amount paid by the States is less than $5.6 million or even if Penn Central elects to bargain away this interest in order to get other advantages. What Penn Central chooses to do with the income-flow it has acquired is beside the point.*

B. *The Reorganization Court's attempt* sua sponte *to remedy the Commission's gross overvaluation of Penn Central common stock by means of an "underwriting" fails to cure the overvaluation and thus leaves unremedied the substantial imbalance between the value of the assets sold and the value of the consideration received.*

As part of the consideration for the assets it sold to Penn Central, the New Haven, on December 31, 1968, received 950,116 shares of Penn Central common stock. The Commission valued this stock at $87.50 per share, a total of approximately $83.1 million or roughly 60% of the total value it assigned to the consideration paid (331 I.C.C. at 688-90, 692; 334 I.C.C. at 68; pp. 46-48a, 50a, 155a). At the end of 1966, the valuation date applied to the New Haven assets, the average price on the New York Stock Exchange was 52⅜. On December 31, 1968, the date of inclusion, the stock closed at 63⅜. The market price of the stock has steadily declined; on December 3, 1969, it closed at 29⅛.

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* We do not believe that this Court need determine the dollar value of the New Haven's right or even necessarily prescribe a method of valuation. In our view, the proper role of this Court is to disapprove the conclusion of the Commission and the Reorganization Court that the right has no value at all.

Both courts rejected the $87.50 valuation as inflated (pp. 298-302a, 428-30a). In its decision of May 28, 1969 the Reorganization Court (later followed by the Three Judge Court*) attempted to meet the objections of the bondholders to the $87.50 price by providing, on its own motion, for an "underwriting" formula whereby Penn Central must, in essence, pay the difference between the average market price of the shares in the 30-day period prior to February 1, 1978 and $87.50 per share, unless Penn Central stock reaches and maintains a price of $87.50 for five consecutive days in the approximately nine year period intervening (pp. 300-01a). The Commission has apparently accepted this modification in principle (334 I.C.C. at 532, p. 226a).

While the "underwriting" formula is a substantial improvement in the terms of inclusion, it nevertheless falls far short of what the New Haven is entitled to. In the first place, since the obligation is neither secured nor entitled to any priority over general creditors, the "underwriting" formula fails to accord the New Haven any protection against the risk of insolvency or reorganization of Penn Central during the intervening nine years, during which the New Haven's right cannot be transferred. In the second place, the "underwriting" formula disregards the fact that a payment to be received nine years in the future is worth substantially less than a payment made today. Assuming a 6% discount rate,** the one generally used by the Commission, and using the market price for the stock (54-54¾) at the time of the Reorganization Court's decision (May 28, 1969), the value of the stock portion of the consideration (including the "underwriting") which the New

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* Judge Weinfeld dissented on this point (pp. 441-42a).

** Of course, a discount rate higher than 6%, which may seem more appropriate in the present money market, would give a significantly lower present value; thus, at a 6% rate, $1 to be received in nine years would be worth 58.1 cents; at an 8% rate, it would be worth only 48.5 cents.

Haven has received is at least $13.2 million less than the $83.1 million value assigned to the stock by the Commission.*

Thus, even after taking the "underwriting" formula into account, the consideration paid by Penn Central is worth at least $13.2 million less than the adjusted net value assigned by the Commission to the New Haven assets. This result is wholly contrary to the constitutional and statutory standard of fairness and equity, namely, substantial equivalence between the value of the assets sold and the value of the consideration paid, which both the Commission and the Courts have found applicable here.

C. ***The Reorganization Court's acceptance of the Commission's view that "going concern value" is an alternative method of valuation rather than an additional element of value in determining liquidation value misconceives and ignores the effect of applicable state law, and thus unlawfully deprives the New Haven of value to which it is entitled.***

Although the evidence showed that the "going concern" value of the New Haven was $55 million and the Commission found in effect that it was $5.5 million (331 I.C.C. at 684-85, pp. 42-43a), the Commission treated "going concern value" as an alternative means of valuation to liquidation value, and therefore disregarded the reduced "going concern value" it found since this value was far less than liquidation value. Both courts affirmed the Commission on this point (289 F. Supp. at 435, 454-55, pp. 239-40a, 347-49a). In

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* At the time of the Reorganization Court's opinion which created the "underwriting" (May 28, 1969), the market value of the stock was approximately $51.6 million, or about $31.5 million below the Commission's value of $83.1 million. The present worth of $31.5 million payable nine years hence, is only about $18.3 million. Thus, the value of the stock plus the present value of the "underwriting" was then only $69.9 million.

so doing, we submit, both the Commission and the Courts misconceived the impact of the condemnation law of New York State and applied a measure of value which, we submit, this Court should reexamine in the light of recent developments in condemnation law.

New York law is now settled that where a public utility (regardless of its profitability) is taken by condemnation and is to be continued in operation by the purchaser, the seller is entitled, not simply to the scrap or liquidation value of the assets sold, but to an additional value because it is a going concern. *Matter of City of New York [Fifth Avenue Coach Lines]*, 18 N.Y.2d 212 (1966); *Matter of Port Authority Trans Hudson Corp.* v. *Hudson Rapid Tubes Corp.*, 20 N.Y.2d 457 (1967), *cert. denied*, 390 U.S. 1002 (1968) (the *PATH* case).

The facts presented here essentially parallel those in *Path* and *Fifth Avenue Coach*, in that a unique public utility has been taken over in the public interest, and is intended to be continued in operation. Moreover, it would seem that in this case, there is a substantial probability that a large portion of the New Haven's New York-based assets will ultimately be sold to an instrumentality of New York and Connecticut.*

In these circumstances, we submit that at least as to the New York-based assets of the New Haven, the Commission and the courts erred in failing to adopt the standard of valuation required by the condemnation law of New York, and should have awarded the substantial *added* compensation for "going concern" value which that State's law provides. We further submit that this case is an appropriate one for this Court to determine the proper

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* Apparently, Penn Central has agreed to such an arrangement. See p. 18 *supra*.

role of "going concern" value under federally-based valuation law in situations where a public utility is to be continued in operation.*

D. ***Under the terms of the Commission's order approving the merger of Penn Central and of this Court's affirmance of the merger, Penn Central should be required to assume all of the New Haven's operating losses for the eleven months between the effective date of the Penn Central merger and the date of inclusion of New Haven operations.***

As the Reorganization Court noted (p. 285a), the New Haven was kept in operation, in spite of steadily increasing losses, in order to preserve it for inclusion in Penn Central and thereby serve the public interest by preserving its operations. We do not believe there is any serious question that Penn Central's agreement to acquire the New Haven weighed heavily in the finding that there was a public interest requisite to support the merger.

Had the New Haven been included in Penn Central at the time of the merger, rather than eleven months later, Penn Central would have assumed all losses after the merger. As Judge Weinfeld pointed out, inclusion would have occurred at merger "had that which should have been done, been done. . . ." (p. 378a). The only reasons inclusion did not then occur were that Penn Central would have found it inconvenient to do so and was reluctant to assume a conditional liability. The New Haven gained nothing from the delay but further dilution of a security already made meager by seven prior years of loss.

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* *Cf. Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949), which suggests that a rule similar to that of New York may be applicable to a taking under federal law.

Shortly before the final oral argument in this Court on the merits of the merger, the Commission, responding to a suggestion of the Reorganization Court, included in its Second Supplemental Report so-called "interim" provisions (331 I.C.C. at 699-720, pp. 57-78a) to keep the New Haven going pending inclusion by providing cash and by meeting the objections of the Bondholders to the imposition of further losses. The adequacy of these provisions was then argued in this Court at some length.

While the Commission assumed that the "loss-sharing" formula it developed as a major aspect of these "interim" provisions would cover 100% of the operating losses of the New Haven during the first year after the merger (331 I.C.C. at 718-19, pp. 76-77a), the Commission later conceded that it fell far short of that percentage (334 I.C.C. at 73-74, pp. 160-61a).*

In these circumstances, we submit, this Court should consider whether it is consistent with the standard of fairness and equity of Section 77 of the Bankruptcy Act or with the intent of this Court in permitting the Penn Central merger to go forward without requiring simultaneous inclusion, to impose a major portion of the interim losses on the New Haven. Such a result, we submit, is neither fair nor equitable.

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* The Commission projected operating losses under its formula at $8.2 million for the year 1968, $2.7 million more than the $5.5 million "ceiling" it imposed under the formula, and awarded the New Haven a lump sum of $5 million for the eleven months between merger and inclusion (334 I.C.C. at 73-74; pp. 160-61a). On these computations, the New Haven bore approximately $2.5 million of losses, out of total losses, computed under the formula, of approximately $7.5 million for the eleven month period. In the Bondholders' view, the actual losses of the New Haven during 1968 were in the order of $15-17 million, and thus the New Haven bore roughly $10-12 million of interim losses.

E. Other substantial errors which should be reviewed.

For brevity, we merely enumerate other aspects of the Reorganization Court's decision which, we submit, substantially deprived the New Haven of the fair value of the property it sold:

1. The Court affirmed the Commission in substantially undervaluing or treating as valueless the New Haven's investments in several other companies, including New York Connecting Railroad Company and Railway Express Agency, Inc.

2. The Court affirmed the Commission in reducing by $3 million the liquidation value of the New Haven's road property for alleged "depreciation" during 1966, although this adjustment was unsupported by the evidence and contradicted by Commission counsel's own previous analysis.

CONCLUSION

For the reasons stated, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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